TION FILED
AUG 19 1983

Nos. 82-206 and 82-229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION No. 1784,
Petitioner,

v.

CARL W. STOTTS, ET AL.,
Respondents.

MEMPHIS FIRE DEPARTMENT, ET AL.,
Petitioners,

v.

CARL W. STOTTS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

J. ALBERT WOLL
815 15th Street
Washington, D.C. 20005

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON • EPES PRINTING CO., INC. • 789-0096 • WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 82-206 and 82-229

FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioner,

v.

CARL W. STOTTS, ET AL.,
Respondents.

MEMPHIS FIRE DEPARTMENT, ET AL.,
Petitioners,

v.

CARL W. STOTTS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO, FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The American Federal of Labor and Congress of Industrial Organizations (AFL-CIO) and the Public Employee Department, AFL-CIO (PED), respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of the position of the petitioners in these consolidated cases.

INTEREST OF THE AMICI CURIAE AND ISSUES TO BE COVERED IN THE BRIEF AMICI CURIAE

The AFL-CIO is a federation of 97 national and international unions having a total membership of approximately 13,500,000 working men and women. The PED is composed of 30 of the AFL-CIO's affiliated unions having a total membership of 2,000,000 public employees.

The AFL-CIO and PED have consistently championed the rights of victims of discrimination to be made whole for the injuries caused thereby. The AFL-CIO's position in that respect is reflected by its joint brief with the United Steelworkers of American in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, advocating the result that this Court reached therein. But that is not the relief that has been awarded below. Instead, the lower courts have imposed a quota under which employees of one race who have committed no wrong and whose seniority entitles them to their jobs will be displaced by employees of another race who are *not* the victims of any discrimination and whose seniority does not entitle them to those jobs.

The AFL-CIO has also consistently championed the rights of *private parties* to adopt, if they choose to do so, racial quotas in employment in appropriate circumstances. The AFL-CIO's position in that respect is reflected by its joint brief with the United Steelworkers of America in *Steelworkers* v. *Weber*, 443 U.S. 193, advocating the result that this Court reached therein. But the instant case involves no privately adopted quotas, but rather quotas imposed by courts as ostensible remedies

for discrimination allegedly violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e and 42 U.S.C. §§ 1981 and 1983.

The legal principles espoused by the courts below would, if embraced by this Court, jeopardize collectively-bargained seniority systems throughout America. The interest of movants in protecting those systems prompts the filing of this brief to address the fundamental issue whether the courts' remedial power includes displacing, on the basis of race, innocent employees from the jobs their seniority has gained them, in order to make room for junior persons of another race *who have not been the victims of the discrimination alleged in the lawsuit.*

CONCLUSION

For the above-stated reasons, this motion for leave to file an *amicus curiae* brief should be granted.

Respectfully submitted,

J. ALBERT WOLL
815 15th Street
Washington, D.C. 20005

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

TABLE OF CONTENTS

		Page
INTRODUCTION AND SUMMARY OF ARGUMENT		1
ARGUMENT		6
CONCLUSION		30
APPENDIX:	Statements of Proponents of the Bill That Became the Civil Rights Act of 1964 Respecting the Availability of Quota Remedies under Title VII	1a

TABLE OF AUTHORITIES

Cases: Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 10, 18, 28
American Tobacco Co. v. Patterson, 456 U.S. 53 (1982) 27, 29
Arizona Governing Committee v. Norris, —— U.S. ——, 51 L.W. 5243 (July 6, 1983) 8
Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 9
Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969) 24
Atlantic Maintenance Co., 134 NLRB 1328 (1961), enforced, 305 F.2d 604 (3d Cir. 1962) 18
Bob Jones University v. United States, —— U.S. ——, 51 L.W. 4593 (May 24, 1983) 21
Bush v. Lucas, —— U.S. ——, 51 L.W. 4572 (June 13, 1983) 5, 16-17
Castaneda v. Partita, 430 U.S. 482 8
Castro v. Beecher, 334 F. Supp. 930 (D.Mass. 1971) 25
Connecticut v. Teal, 457 U.S. 440 (1982) 8
Crowell v. Benson, 385 U.S. 22 30
Darigold Dairy Products Co., 194 NLRB 701 (1971) 18
Dayton Board of Education v. Brinkman, 433 U.S. 406 ..... 6, 12
Ford Motor Co. v. EEOC, —— U.S. ——, 50 L.W. 4937 (June 28, 1982) 10, 12, 13-14, 18
Fox v. United States Dept. of Housing, 680 F.2d 315 (3rd Cir. 1982) 2
Franks v. Bowman Transportation Co., 424 U.S. 747 ..... 10-12, 18, 20, 28, 29
Fullilove v. Klutznick, 448 U.S. 448 29
General Building Contractors Association v. Pennsylvania, —— U.S. ——, 50 L.W. 4975 (June 29, 1982) 9
W.R. Grace and Co. v. Local Union 759, Rubber Workers, —— U.S. ——, 51 L.W. 4643 (May 31, 1983) 2

TABLE OF AUTHORITIES—Continued

	Page
Great Lakes Dredge Dock Co., 169 NLRB 631 (1968)	18
Hecht Co. v. Bowles, 321 U.S. 321	6
Herman & MacLean v. Huddeston, —— U.S. ——, 51 LW 4099 (Jan. 24, 1983)	25
Hills v. Gautreaux, 425 U.S. 284	6
The Hughes Corp., 135 NLRB 122 (1962)	18
Immigration and Naturalization Service v. Chadha, —— U.S. ——, 51 L.W. 4907 (June 28, 1983)	25
Johnson v. Railway Express Agency, 421 U.S. 454	15
Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702	7-8
Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982)	25
Milliken v. Bradley, 418 U.S. 717 (Milliken I)	6, 7, 9
Milliken v. Bradley, 433 U.S. 267 (Milliken II)	5, 6, 7, 10-12
Nevada Consolidated Copper Corp., 26 NLRB 1182 (1940)	18
Pasadena City Bd. of Education v. Spangler, 427 U.S. 424	6, 12
Personnel Administrator of Mass v. Feeney, 422 U.S. 256	9
Porter Co. v. NLRB, 397 U.S. 99 (1970)	27-28
Shelley v. Kraemer, 334 U.S. 1	8, 29
Steelworkers v. Weber, 443 U.S. 193	14
Swann v. Board of Education, 402 U.S. 1	6, 9, 12
Teamsters v. United States, 431 U.S. 324	10-14, 18, 27, 28
United States v. Armour & Co., 402 U.S. 673 (1971)	1
United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971)	24-25
United States v. Security Industrial Bank, —— U.S. —— 51 L.W. 4007 (November 30, 1982)	30
United States v. Swift & Co., 286 U.S. 106	3

TABLE OF AUTHORITIES—Continued

Page

University of California Regents v. Bakke, 438 U.S. 265 ..... 8, 29
Washington v. Davis, 426 U.S. 229 (1976) 9
Zipes v. Trans World Airlines, Inc., 455 U.S. 385 2

Constitution and Statutes:

United States Constitution

First Amendment 16
Fourteenth Amendment ..... *passim*

Civil Rights Acts of 1866 and 1871

42 U.S.C. § 1981 ..... *passim*
42 U.S.C. § 1983 ..... *passim*
42 U.S.C. § 1988 ..... 5, 15-16

Civil Rights Act of 1964, Title VII ..... *passim*

§ 703 ..... 7, 19
§ 703(h) 26-29
§ 703(j) 25
§ 706(g) ..... *passim*

Equal Employment Opportunity Act of 1972 19-26

National Labor Relations Act of 1964

§ 8(a)(3) 18
§ 8(d) 27-28
§ 10(c) 18, 27-28

Miscellaneous:

Congressional Record, Vol. 110 ..... 19, 20
Development in the Law—Title VII, 84 Harv. L. Rev. 1109 (1971) 25
H.R. Rep. 914, 88th Cong., 1st Sess. (1963) 18
Legislative History of the Equal Employment Opportunity Act of 1972, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (Nov. 1972) 20, 22-26

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This brief *amici curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

At the threshold of this case are two issues of more than passing significance: first, whether a court may, in the absence of any adjudication of liability, modify a consent decree by adding a type of relief—here an injunctive order that layoffs be governed by racial quotas rather than by the seniority rules that otherwise would have obtained—to which the defendants (collectively, the employer) have never agreed; second, whether the plaintiffs and the employer, again in the absence of any adjudication of liability, may abrogate contractual obligations that the employer owes to the union representing the employer's employees by agreeing, without the union's consent, to entry of a consent decree that purports to override the union's contractual rights. We address these issues only in the margin because we understand the first is being addressed by petitioners, who are better positioned than we to elucidate the meaning of the consent decree, and because the second turns on a state law question not decided below and thus is not ripe for decision in this Court.[1]

---

[1] Under the "four-corners of the decree" test of *United States* v. *Armour & Co.*, 402 U.S. 673, 681-682 (1971), it cannot be found that the parties in this case actually agreed to the use of a racial quota for determining the order of layoffs. The courts below did not purport to find such an agreement, but instead concluded that the district court had power to *modify* the consent decree to achieve that result. Nor did the courts below determine in light of changed circumstances to reopen a case purportedly settled by a consent

We concentrate instead on a third issue respecting the propriety of the district court's order as modified: whether the order in its substance exceeds the proper bounds of an equitable decree. In examining that issue, we treat the order here as if that order had been

---

decree, to adjudicate the original allegations of wrongdoing, and if violations were found to modify the decree to impose additional remedies. In this instance, rather, despite the defendants' express disclaimer in the consent decree that they had committed any violations, and without any adjudication that they had, the courts below held that the modification providing additional relief to the plaintiffs could be made. That action would be permissible, we submit, only if the original consent decree could be construed within its "four corners" to contain the defendants' consent to the district court making so sweeping a modification of the decree as entered. See *Fox* v. *United States Dept. of Housing*, 680 F.2d 315 (3rd Cir. 1982). We believe that the original consent decree is not susceptible to that construction.

If the original consent decree *were* susceptible to that construction, it would follow that the employer had "consented" to the judicial elimination *pro tanto* of whatever seniority rights were enjoyed by employees under the collective agreement between the union and the employer. The court below did not decide, but merely assumed *arguendo*, that under Tennessee law the collective agreement is legally enforceable. (Union Pet. App. A 38 and n.20). *If* the collective agreement created legally enforceable seniority rights, the question would be posed whether a district court is empowered, with the "consent" of the employer and the plaintiffs, but without an adjudication that the employer has violated any law, to enter an order that abrogates contractual seniority rights enjoyed by employees pursuant to a collective agreement negotiated by their union (neither the affected employees nor their union having consented to the abrogation). That issue was debated by the litigants, but not reached or decided by this Court, in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385. Our position on that issue—that A and B cannot contract away C's rights, nor "consent" to a court's abrogating those rights—is fully stated in the brief we filed in *Zipes*. Brief for the AFL-CIO in No. 80-951. See also Brief for Petitioner in No. 80-951, pp. 35-37; Reply Brief for Petitioner in No. 80-951, pp. 1-6. This Court's later decision in *W.R. Grace and Co.* v. *Local Union 759, Rubber Workers*, —— U.S. ——, 51 L.W. 4643, 4647 (May 31, 1983), holding that a concilitation agreement between an employer and the EEOC cannot override contractual seniority rights absent the union's consent, lends additional support to the thesis stated in these briefs.

founded on an adjudication of liability, rather than on consent by the plaintiffs and the employer. Our approach avoids the question whether a court has less power to enter a decree drawn on racial grounds when its remedial authority is founded, as here, solely on the supposed consent of the parties to the litigation, than when its remedial authority is founded on adjudicated violations. Our approach assumes, of course, that courts do not, by reason of a consent, have *more* power to grant this remedy than the judiciary possesses upon an adjudication that violations have occurred. That assumption, we believe, cannot be seriously disputed: whatever might be the power of a court to approve a consent decree inflicting injury *upon the defendant alone* that the court could not have inflicted upon an unwilling defendant following adjudication of liability (*cf. United States* v. *Swift & Co.*, 286 U.S. 106, 116-117), it must surely be the law that a remedy that a court is powerless to enter against a defendant *because its impact upon innocent third parties renders that remedy inequitable* is one that a court has no greater power to enter simply because the defendant is prepared to consent to the infliction of that inequity upon others.

On these premises, the issue that we address here may be stated as follows: whether in an employment discrimination case a court may order that employees of one race who have done no wrong be deprived of their jobs to open those positions to persons of another race *who were not the victims of any unlawful employment practice of the defendants.*[2] In more concrete terms, the

[2] There is no dispute in this case that (a) but for the order at issue here the layoffs in question would have been made on the basis of seniority, and (b) the beneficiaries of the order at issue include persons who were not victims of the discrimination alleged in the complaint. The district court's order requires that seniority *not* be applied "where it will decrease the percentage of black lieutenants, drivers, inspectors and privates that are presently employed in the Memphis Fire Department." Union's Pet. App. A78. Thus, white employees, who by seniority would not have been laid off, were

question is whether, consistent with the principles of equity, the provisions of the applicable federal statutes, and the constitutional limits on race-conscious action by government, a court order may force employees to yield their jobs, solely because of their race, to persons of another race who have not been deprived of those jobs by reason of discrimination. This question is one of the utmost sensitivity and has never before been addressed by the Court.

The answer to this question, we believe, emerges from several distinct considerations, all of which point to the conclusion that the courts are without authority to remedy a violation by adopting quotas that, on the basis of race, displace innocent employees of one race from their jobs to make room for persons of another race who were not victims of that violation. As we discuss more fully herein:

1. The commands alleged to have been violated here—Title VII, 42 U.S.C. § 1981, and the Fourteenth Amendment—all protect individuals from discrimination; none directs a racial balance in employment. The judicial authority to remedy violations of those commands is coincident with the protections conferred: victims of such violations are to be made whole; no remedies are appropriate for nonvictims.

2. The quota remedy entered below does not conform to this remedial scheme: that remedy extends affirmative

---

as a result of the court's order laid off in lieu of black employees, so that the percentage of blacks in the Department could be maintained. There is no allegation or evidence that the blacks who were able to avoid being laid off as a result of the order were themselves victims of prior hiring discrimination by the Department. This is not to say that there might not be among those who benefit from the quota some who coincidentally were victims of prior discrimination, but only that the class of beneficiaries of the quotas is not defined as, nor confined to, prior victims, nor is its effect—even when coincidentally benefiting a prior victim—to restore that victim to his or her rightful place.

relief to persons who were not victims of the discrimination alleged and who thus are, without the benefit of any court order, already in "the position they would have occupied in the absence of [defendants' discriminatory] conduct." *Milliken* v. *Bradley*, 433 U.S. 267, 280.

3. A concern for the impact of remedies upon innocent third persons is deeply embedded in the historic power of equity. Whatever may be the appropriate equitable balance when a remedy is sought to make whole the *victims of discrimination* at the expense of innocent employees, there is simply no competition of legitimate interests that could justify the displacement of innocent employees, on the basis of race, for the benefit of *nonvictims*.

4. Congress decided in enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, to disapprove quota remedies. That decision establishes the unavailability of the remedy in question under Title VII and also points to the same conclusion with respect to § 1981 and the Fourteenth Amendment (here invoked through 42 U.S.C. § 1983). The remedial provision implementing §§ 1981 and 1983—42 U.S.C. § 1988—directs that remedies thereunder be fashioned "in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect." As complete make-whole relief can be provided to victims without a quota remedy, it is "suitable" to respect the congressional judgment against quota remedies. Indeed, even on the hypothesis that courts have power to go beyond § 1988 in fashioning remedies for Fourteenth Amendment violations, the proper course is to respect the congressional judgment where, as here, that judgment does not preclude the provision of complete make-whole relief. *Bush* v. *Lucas*, —— U.S. —— 51 L.W. 4752 (June 13, 1983).

5. Congress also decided in enacting Title VII to protect *bona fide* seniority systems. That decision precludes the issuance under Title VII of remedies conflicting with seniority systems when such remedies are not

needed to restore victims to their rightful place. And for the reason just stated, that congressional judgment is entitled to respect in the fashioning of remedies under §§ 1981, 1983, and the Fourteenth Amendment.

6. It is a difficult and unsettled question whether a federal court violates the Constitution by ordering a quota remedy such as that at issue here. This Court's settled rule to avoid, where "fairly possible," resolving difficult constitutional questions is additional reason, if any be needed, why the quota remedy entered below should be foresworn as lacking equity.

ARGUMENT

1. The point of departure for analyzing the propriety of a court order displacing employees of one race who have done no wrong from their jobs to make room for persons of another race who have not been the victims of any discrimination by the defendant is the nature of the violation for which the order in question purports to be the remedy. The remedial power of a court sitting in equity is not unlimited. *Swann* v. *Board of Education*, 402 U.S. 1, 3; *Hills* v. *Gautreaux*, 425 U.S. 284, 294; *Pasadena City Bd. of Education* v. *Spangler*, 427 U.S. 424, 434. Cf. *Hecht* v. *Bowles*, 321 U.S. 321, 329-330. Foremost among the applicable limitations is that "the scope of the remedy is determined by the nature and extent of the . . . violation." *Milliken* v. *Bradley*, 418 U.S. 717, 744 (*Milliken I*); see also, e.g., *Swann*, 402 U.S. at 16; *Milliken* v. *Bradley*, 433 U.S. 267, 280 (*Milliken II*). Given that limitation, the task of the equity court, "once a . . . violation is found, . . . is . . . to tailor 'the scope of the remedy' to fit 'the nature and extent of the . . . violation.'" *Hills*, 425 U.S. at 294; see also *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420. And this Court has defined with precision the way in which the remedy must relate to the violation: "the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to

the position they would have occupied in the absence of such conduct.'" *Milliken II*, 433 U.S. at 280; see also *Milliken I* at 746.

Thus, in assessing whether a remedial decree has exceeded proper limits, it is critical to know what is the violation being remedied, who are the victims, and how has the violation affected the victims. Here, as stated *supra* at pp. 2-3, we proceed by assuming *arguendo* that the plaintiffs could have proven the violations alleged in their complaints. Broadly read, the complaints allege that the defendants, who together constitute the employer in this case, violated Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e), the Civil Rights Act of 1866 (42 U.S.C. § 1981), and the Fourteenth Amendment (invoked pursuant to 42 U.S.C. § 1983), by discriminating against blacks in hiring and in promoting. The complaints do not allege that *all* blacks employed by the Memphis Fire Department in fact were injured by one or both forms of discrimination; indeed, neither of the plaintiffs alleges that he personally was the victim of any hiring discrimination.

Each of the three provisions sued under is designed to protect individuals from discrimination on the basis of race; none is intended to mandate racial balance or the achievement of particular proportions of the races in a given workforce. In Title VII, the language of the provision defining unlawful conduct (§ 703) and of the remedial provision (§ 706(g)) focuses expressly on protecting the "individual" from racial, religious, sexual or national origin discrimination in employment. And this Court has repeatedly recognzed that focus. In *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702, 708, this Court stated:

> The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class. . . . Even a true generalization about a class

> is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

In *Connecticut* v. *Teal*, 457 U.S. 440, 453-454, the point was repeated:

> The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee. See, *e.g.*, §§ 703(a)(1), (b), (c) . . . .

And, most recently, in *Arizona Governing Committee* v. *Norris*, —— U.S. ——, 51 L.W. 5243 (July 6, 1983), this point was reiterated in each of the individual opinions. *Id.* at 5244, 5245 (Opinion of Justice Marshall); 5251 (Opinion of Justice Powell); 5252 (Opinion of Justice O'Connor).

Similarly, § 1983 and § 1981 create rights, or establish a mechanism to enforce rights, in *individuals* to be free of discrimination based on race. Section 1983 is designed to protect "any citizen . . . or other person within the jurisdiction"; transgressors incur liability "to the party injured." The source of the right to be free of racial discrimination enforceable under § 1983 is the Fourteenth Amendment. That Amendment, like Title VII, is designed at protecting individuals. As this Court stated in *Shelley* v. *Kraemer*, 334 U.S. 1, 22:

> The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

See also *Castaneda* v. *Partita*, 430 U.S. 482, 499-500; *University of California Regents* v. *Bakke*, 438 U.S. 265, 299 (Opinion of Justice Powell.)

And, consistent with that understanding, this Court repeatedly has held that the Fourteenth Amendment, whether sued on directly or through § 1983, does not prohibit official conduct simply because that conduct has a greater adverse effect on racial or ethnic minority *groups* than on majority *groups*. In *Washington* v. *Davis*, 426 U.S. 229, 239, the Court held that "a racially neutral qualification for employment is [not] discriminatory . . . simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." *Id.* at 245. "That other Negroes also failed to score well would, alone, not demonstrate that [plaintiffs] *individually* were being denied equal protection of the laws . . ." *Id.* at 246 (emphasis added). See also, *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-265; *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256, 272.

Actions brought under § 1983, and founded as here on the Fourteenth Amendment, are thus to provide "the party injured" relief from purposeful discrimination by the state, and this Court has expressly stated that the Fourteenth Amendment does not require "any particular degree of racial balance or mixing." *Swann*, 402 U.S. at 24; *Milliken I*, 418 U.S. at 739-741.

The same is true of § 1981. That statute too is addressed to discrimination against individuals as such. In *General Building Contractors Association* v. *Pennsylvania*, —— U.S. ——, 50 L.W. 4975, 4977 (June 29, 1982), this Court held that § 1981 does not reach "practices that merely result in a disproportionate impact on a particular class. . . ."

In short, the vice of the employer's practices in this case, assuming the allegations of the complaints to be true, is not that the employer failed to achieve a racial balance, but that the employer intentionally refused to hire or promote particular black individuals because of their race. The victims of that violation are those class members who, within the limitations period, applied for

and were refused hire or promotion on account of their race or who would have so applied but did not because of knowledge of the employer's racial practices. *Teamsters* v. *United States*, 431 U.S. 324, 357-377. And, what each of those victims has lost as a result of that violation is the wages, benefits, and seniority status that he would have received (and would presently enjoy) but for the defendants' wrongful refusal to hire or promote him. These, then, are the parameters that determine the scope of the remedy permitted in this action.

2. It follows from what we have shown thus far that the individuals who have suffered discrimination by the defendants—the victims—are the ones entitled to be made whole. Individuals whose claim to an entitlement to relief is that they are members of the same minority group as the victims, and who have not suffered from such discrimination, are already in "the position they would have occupied in the absence of [the defendants' discriminatory] conduct," *Milliken II*, 433 U.S. at 280, and are not entitled to a court order that improves their position.

This limitation on equitable decrees is confirmed by decisions of this Court implementing Title VII. Those decisions are instructive with regard to §§ 1981 and 1983 as well, for this Court has recognized that Title VII's remedial provision—§ 706(g)—authorizes the courts to exercise "the 'historic power of equity.'"[3] In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, the Court drew the line as to the scope of permissible remedy between make-whole relief for "actual victims of racial discrimination" (*Franks*, 424 U.S. at 772), which is permitted, indeed virtually required, and relief for non-victims of such discrimination, which is not permitted. In *Franks*, the Court stated that the "federal courts

---

[3] *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416, 420-421. See also, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 764, 777 & n.39; *id.* at 785-786, 789-790 (Opinion of Justice Powell); *Teamsters*, *supra*, 431 U.S. at 374-375; *Ford Motor Co.* v. *EEOC*, —— U.S. ——, 50 L.W. 4937, 4939 (June 28, 1982).

are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring." 424 U.S. at 764. And the Court made clear that members of the plaintiff class in *Franks* who were found *not* to be actual victims of the defendant employer's discrimination—*viz.*, who were "not in fact discriminatorily refused employment as an ORT driver" (*id.* at 773 n.32)—would not be entitled to any equitable relief. *Id.* at 772-773, and n.32. Then, in *Teamsters*, the Court analyzed at length the question of how to determine whether a claimant for relief is an actual victim of the litigated violation and thus eligible for relief. 431 U.S. at 356-377. That lengthy discussion in *Teamsters* would have been pointless if courts were empowered under Title VII to provide remedies to non-victims.[4]

The result in *Franks* and *Teamsters* follows from the general principles of equity discussed above: the victims of the violation are made whole for the losses they suffered as a result of the violation; and the remedy is afforded only to those who are victims of that violation.[5]

---

[4] Under *Franks* and *Teamsters*, when a class violation of hiring discrimination is proven, the burden of proof shifts to the defendant to establish that individual members of the class who applied for the position or positions in question were not actually victims of the violation. This shift in the burden of proof, far from authorizing relief to nonvictims, simply determines how the court is to decide whether a given individual *was* a victim of discrimination and is thus entitled to relief. Members of the class against whom the unlawful practice was committed—*e.g.* black applicants for jobs from an employer who has been proved to have had an across-the-board practice of refusing to hire blacks—are presumed to be vticims, unless the defendant proves otherwise. *Franks*, 424 U.S. at 773 n.32; *Teamsters*, 431 U.S. at 357-362.

[5] This Court's school desegregation decisions follow precisely the same remedial principle: " 'to restore the victims of discriminatory conduct to the positions they would have occupied in the absence of such conduct.' " *Milliken II*, 433 U.S. at 280. In school cases, the violation generally consists of practices intentionally maintained

3. In the context of competitive hiring and competitive promotion decisions, however, the Court has recognized that even a remedy designed only to make the victims of discrimination whole has a heavy cost: Where a court order confers upon the individual who was a victim of the employer's wrong an improved competitive status with respect to promotion, or as in this case layoff, some employee, who was not in any respect responsible for the employer's wrong, is of necessity disadvantaged. A majority of the Court in *Franks* determined that it is consistent with equity for the innocent employee to be disadvantaged so that the victim can be made whole. *Franks*, 424 U.S. at 776-779; compare *id.* at 780-781 (Opinion of Chief Justice Burger) and *id.* at 787-793 (Opinion of Justice Powell.) But the Court has also determined that the balance of equities is quite different when the question is whether to disadvantage the innocent employee of one race in order to confer a competitive advantage on an individual of another race who was not the victim of any wrong of the employer and thus does not have a make-whole claim. *Teamsters* and *Ford Motor Co.* v. *EEOC*, —— U.S. ——, 50 L.W. 4937 (June 28, 1982), stand for the following proposition: it is not equitable for a court to direct that, on the basis of race, an innocent employee be deprived of his job so that he

---

by a school board for the purpose of segregating the races. All minority students subjected to such practices are victims of the violation. To make such victims whole may require both the "dismantling" of the discriminatory practices and the affirmative correction of education deficiencies which resulted from those practices. *Milliken II*, 433 U.S. at 282-283; *Swann*, 402 U.S. at 28, 31-32. In that context, for example, make-whole relief may require that a "dual system" be dismantled, which may in turn require such actions as race-conscious assignment policies for teachers and pupils alike. But, in that context, too, this Court has been careful to confine remedial decrees to the make-whole purpose, and has not permitted such decrees to be used to achieve goals, such as racial balancing, beyond that purpose. *Swann*, 402 U.S. at 15-16, 31-32; *Pasadena City Bd. of Education*, 427 U.S. at 435-437; *Dayton Board of Education*, 433 U.S. at 419-420 (1977).

may be replaced by an employee who was not the victim of any discrimination by the employer.

In *Teamsters*, the Court first made it clear that non-victims have no entitlement to a remedy of competitive seniority, 431 U.S. at 367-372, and saw the judiciary's task of equitable balancing as called for only with respect to victims:

> [*A*]*fter the victims have been identified and their rightful place determined*, the District Court will . . . be faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing. [431 U.S. at 372, emphasis added].[6]

In *Ford Motor Co.*, this Court disapproved as inequitable a remedy that would have encouraged employers to give competitive seniority advantage to persons who *claim* they are victims of discrimination but whose claims have not yet been adjudicated:

> . . . Title VII . . . permits us to consider the rights of "innocent third parties." *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 723 (1978). See also *Teamsters* v. *United States*, 432 U.S. 324, 371-376 (1977). The lower court's rule places a particularly onerous burden on the innocent employees of an employer charged with discrimination. Under the court's rule, an employer may cap backpay liability only by forcing his incumbent employees to yield seniority to a person who has not proven, and may never prove, unlawful discrimination. . . .
>
> The sacrifice demanded by the lower court's rule, moreover, leaves the displaced workers without any remedy against claimants who fail to establish their claims. If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely while retain-

[6] Even thus limited to victims, the Court saw striking the balance in *Teamsters* (where the innocent employees were on layoff) as not foreordained by the decision in *Franks*. See 431 U.S. at 374-376.

> ing a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that " 'the large objectives' " of Title VII, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975) (citation omitted), require innocent employees to carry such a heavy burden. [50 L.W. at 4942].

Where, as in the instant case, a court is asked to direct that a nonvictim of discrimination be given the job of an innocent employee, solely because the nonvictim is the same race as other persons who were actually discriminated against by the employer, there is not the competition of legitimate interests that calls into play equitable discretion. To give the nonvictim the job is not to "restore [him to his] rightful place" (*Teamsters*, 431 U.S. at 375)—he was not wrongfully deprived of that place in the first instance. On the other hand, the "innocent worker . . . unfairly relegated to the unemployment lines" as a result of such a court order would have a "wrong done him." *Ford Motor Co.*, 50 L.W. at 4942.[7]

4. There is yet another consideration that counsels against upholding the quota remedy entered below: the explicit congressional determination not to provide for quota remedies in Title VII cases. In enacting Title VII, Congress specifically addressed the question of court-ordered quotas and determined unequivocally not to permit them. We set forth below the provisions of the stat-

---

[7] Indeed, had the substance of the injunction in this case been instead part of a "private, voluntary, race-conscious affirmative action plan[]" set up by an employer, or an employer and a union, that plan might well be found in *violation* of Title VII. In *Steelworkers* v. *Weber*, 443 U.S. 193, 208, in explaining why the plan at issue in that case did not violate Title VII, the Court emphasized:

> At the same time, the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees.

ute and the legislative history that manifest that determination. Before turning to that showing, however, we pause to discuss the significance of the determinations that Congress made in enacting Title VII to the remedial issues in this case.

As previously noted, the plaintiffs' claims in this case were brought not just under Title VII but under §§ 1981, 1983, and the Fourteenth Amendment as well. Insofar as the action is grounded in Title VII, the determinations made by Congress respecting the scope of remedies for violation of that statute are of course controlling; the courts are without power to furnish remedies for Title VII violations that Congress has not authorized. Those determinations do not, however, furnish a similarly conclusive answer respecting the power of courts under §§ 1981 and 1983; statutes that were enacted a century before and that contain their own remedial provision. See, *e.g.*, *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459-60. The remedial authorization furnished by Congress with respect to actions brought under §§ 1981 and 1983 is contained in 42 U.S.C. § 1988, which provides in pertinent part:

> The jurisdiction in civil and criminal matters conferred on the district courts by [*inter alia*, §§ 1981 and 1983] *shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect* . . . [Emphasis added].

This provision bespeaks a congressional intention that points the courts, in the circumstances of this case, to the explicit decisions respecting remedies made by Congress in such statutes as Title VII, subject to the caveat that those decisions may not be carried over if they would prevent "suitable" relief to vindicate the wrongs made actionable by §§ 1981 and 1983. Where, as here, complete make-whole relief can be provided without incorporating a remedy disapproved by Congress, it is "suitable" to abstain from the disapproved remedy.

while, as we show below, highly relevant,

Of course, given that § 1983 furnishes a cause of action to enforce what here are *constitutional* rights, it is arguable that the courts' remedial power is not circumscribed by § 1988. It does not follow, however, that Congress' judgments in Title VII about what remedies are appropriate, and what inappropriate, are to be disregarded in fashioning relief for constitutional violations. Thus, even assuming *arguendo* that the federal courts have *power* in constitutional cases to enter quota remedies compelling the layoff of innocent employees of one race to make room for nonvictims of another race, the congressional judgment that such remedies are inappropriate is entitled to weight in the courts' determination whether that power should be exercised. In *Bush* v. *Lucas*, —— U.S. ——, 51 L.W. 4752 (June 13, 1983), for example, where the petitioner sought "a new nonstatutory damages remedy for federal employees whose First Amendment rights are violated by their superiors," (*id.* at 4753), this Court declined to adopt this remedy, explaining:

> Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive remedies . . . we conclude that it would be inappropriate for us to supplement that regular scheme with a new judicial remedy. [51 L.W. at 4753.]

This Court did not question its "power [in suits arising directly under the Constitution] to grant relief that is not expressly authorized by statute" (*id.* at 4754), but concluded that the circumstances warranted no departure from its predisposition that "such power is to be exercised in the light of relevant policy determinations made by the Congress" (*id.*). The Court ultimately answered in the negative the question "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by a new judicial remedy for the constitutional violation at issue." *Id.* at 4758.

With that preface, and with the knowledge that the remedy in dispute here is not necessary to make whole the victims of the wrong alleged,[8] we turn to a demonstration that Congress did indeed, in enacting Title VII, specifically reject the concept of quota remedies.

a. The sole Title VII provision defining the remedies that a court may order upon finding a violation of the statute is § 706(g). As enacted in 1964, § 706(g) empowered courts, upon finding a violation, to "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . ." The last sentence of § 706(g), in turn, states that even where a court "finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful Title VII employment practice," the resulting remedial order may *not* run in favor of an individual who suffered adverse employment consequences for "any reason other" than such discrimination. Senator Humphrey cited this sentence during the debates as proof that the opponents' charge that the bill authorized court-ordered quotas was incorrect (see App. p. 2a, *infra*). Certainly then the literal language of § 706(g) bars a remedial order that runs in favor of individuals who are members of a minority group but who have never suffered employment discrimination at the hands of the respondent. A quota remedy—*viz.* a remedy providing employment benefits to members of a minority group who have not been shown to have suffered adverse employment consequences by reason of the respondent's unlawful employment practice—therefore appears from the words of § 706(g) to be the very paradigm of the remedial

---

[8] The Court found it important in *Bush* that "Congress intended that these remedies [*i.e.* without the additional remedy sought in *Bush*] would put the employee 'in the same position he would have been in had the unjustified or erroneous personnel action not taken place.'" *Id.* at 4758. See also, *id.* at 4759 (Opinion of Justice Marshall).

order Congress determined should *not* issue in enacting the 1964 Civil Rights Act.

Moreover, the Court has recognized that the decisions under § 10(c) of the NLRA are an informative guide to the intent of the Congress that enacted § 706(g). *Franks*, 424 U.S. at 769, 774-775 and n.34; *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419; *Teamsters*, 431 U.S. at 366-367; *Ford Motor Co.*, 50 LW at 4939 n.8. It was well settled by 1964 that when an employer is found to have discriminated against union members in violation of § 8(a)(3) of the NLRA, the remedy provided under § 10(c) by the National Labor Relations Board is to reinstate the victims of the discrimination and award them backpay and rightful place seniority. In the NLRA's history an employer had never been directed to give preferential treatment to union members who were not victims of the violation.[9]

b. Title VII's sponsors repeatedly confirmed that the Title does not empower the courts to issue quota remedies. Before the 1964 debate began, the bill's opponents cited quota remedies as one of the evils that would be produced. H.R. Rep. 914, 88th Cong., 1st Sess. (1963) at 72. These opponents declared this "a not too subtle system of racism-in-reverse." *Id.* at 73. In response to this charge, the principal sponsors of the bill repeatedly and unequivocally declared that under tne bill the courts would be without power to order quota remedies. We quote these declarations in Part I of the Appendix to this brief.

The statements quoted in Part I of the Appendix—which explicitly articulate the courts' want of power to order quota remedies—are not by any means the only

---

[9] See *Franks*, 424 at 774-775, n.34; and see, *e.g.*, *Nevada Consolidated Cooper Corp.*, 26 NLRB 1182, 1231 (1940), enforced, 316 U.S. 105; *Darigold Dairy Products Co.*, 194 NLRB 701 (1971); *Great Lakes Dredge Dock Co.*, 169 NLRB 631, 635 (1968); *The Hughes Corp.*, 135 NLRB 1222, 1223 (1962); *Atlantic Maintenance Co.*, 134 NLRB 1328, 1330 (1961), enforced, 305 F.2d 604 (3d Cir. 1962).

"anti-quota" statements made by the bill's proponents. In addition to the charge that the EEOC and/or courts would impose quota remedies, opponents charged that racial imbalance would be found to be a *per se* violation of Title VII, and that employers would opt for quotas to avoid the *inference* of discrimination that might be drawn from racial imbalance.[10] In answering these various charges, the proponents repeatedly denied that Title VII would require quotas. Some of these remarks were clearly responding to "quota" charges other than that courts would order quotas; others are ambiguous and may well have been specifically addressed to the charge that courts would order quotas. But all reflect the mood of the 1964 Congress and thus help explain *why* § 706(g) was drafted so as not to empower the courts to issue quota remedies. We set forth a number of these statements in Part II of the Appendix to this brief.

In short, everything said and done in 1964 leads to the conclusion that Congress in enacting Title VII intended to provide affirmative remedies for the victims of the defendants' discrimination but not for nonvictims. That intent as we have shown is crystalized in positive statutory law in both the basic substantive provision of the Title—§ 703 (see *supra* at p. 8)—and in the basic remedial provision—§ 706(g).

c. Nothing Congress has said or done since provides a basis for reading Title VII as amended differently in this regard from Title VII as originally passed. In 1972, Title VII was amended by the Equal Employment Opportunity Act of 1972. Section 703, which as we have shown, *supra* at p. 8, defines the practices prohibited by the Act as wrongs to "individuals," was not amended. Section 706(g) was amended to add an authorization to grant "any other equitable relief the court deems appro-

---

[10] See, *e.g.*, 110 Cong. Rec. at 5092 (Sen. Hill); 7418-20 (Sen. Robertson); 7800, 8500-01 (Sen. Smathers); 8618 (Sen. Sparkman).

priate" to the specific remedies already contained in the provision. The only explanation for that amendment—the Section-by-Section Analysis that was introduced in both houses [11]—indicates a single remedial objective (118 Cong. Rec. 7166, 7168):

> *Section 706(g)*—This subsection is similar to the present section 706(g) of the Act. . .
>
> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that *persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.* [Emphasis added].

The Congress that "added the phrase speaking to 'other equitable relief' in § 706(g) . . . indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." *Franks, supra*, 424 U.S. at 764, n.21. This Section-by-Section Analysis "is emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require *to effect restitution, making whole insofar as possible the victims of racial discrimination* . . ." *Id.* at 764 (emphasis added).

---

[11] The Section-by-Section Analysis quoted in text was first submitted to the Senate by Senator Williams (the bill's floor manager in the Senate) prior to adoption of the Senate bill. Senator Williams submitted it again in conjunction with the Conference Report, as did Rep. Perkins in the House. See *Legislative History of the Equal Employment Opportunity Act of 1972*, prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (Nov. 1972), pp. xv n.3, 1769, 1773-74, 1843-44, 1848, 1856.

The legislative history of the 1972 amendments is devoid of a single word suggesting that the amendment to § 706(g) was intended to authorize quota remedies. Given the explicit anti-quota decision made in 1964, and the retention in 1972 of the sentence in § 706(g) that was the embodiment of that decision (see p. 17, *supra*), there is no conceivable warrant for construing the addition of "other equitable relief" as an authorization of quota remedies.

It has been suggested by parties in other cases [12] that even granting that the 1964 and 1972 Congress' legislative *actions* do not provide support for the proposition that Title VII authorizes quota remedies, the judicial power to order such remedies may properly be inferred from certain congressional *refusals to act* in 1972. Relying on such inferences is hazardous at best. "Ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation." *Bob Jones University* v. *United States*, —— U.S. ——, 51 L.W. 4593, 4600 (May 24, 1983). But there is no need here to engage in the debate as to the balance between the hazards and utility of drawing such inferences. For in this instance the congressional determinations in 1972 not to amend the 1964 Act do not in fact support the inference that the paradoxical purpose of certain refusals to alter Title VII was to signal a new consensus that both victims of the defendant's discrimination and nonvictims alike are to be entitled to affirmative relief under Title VII. A review of what happened in the House is dispositive.

The House debate focused on two competing bills—one (H.R. 1746) introduced by Rep. Augustus Hawkins and reported out by the House Labor Committee, and the other (H.R. 9247) offered by Rep. John Erlenborn

---

[12] See, *e.g.*, Brief for Respondent in *Boston Firefighters Union, Local 718* v. *Boston Chapter, NAACP, Inc.*, Nos. 82-185, *et al.* at pp. 48-53.

"as an amendment in the nature of a substitute." 72 Leg. Hist. 150-151.[13] The principal differences between the bills—and the subject of virtually all the debate—involved matters wholly irrelevant to the issue here (e.g., Should the EEOC be given "cease and desist" power? Should Title VII be extended to public employment?) Insofar as relevant here, the difference between the bills was that the Comittee bill proposed to transfer administration of Executive Order 11246 from the Department of Labor's Office of Federal Contract Compliance (OFCC) to the EEOC, while the Erlenborn bill did not. The Committee bill was accordingly perceived by some as providing the EEOC with power to order quotas, for the OFCC in *its* administration of the Executive Order had made it a condition to receipt of government contracts that the contractor adopt "goals and timetables." The discussion of quotas in the House in 1972 thus centered on the propriety of quotas under the Executive Order. Rep. Erlenborn stated the theory on which quotas, although properly precluded from imposition under Title VII, had been treated differently under the Executive Order:

> The OFCC is an altogether different type of jurisdiction [from the EEOC]. It is not based upon constitutional rights. It is not based upon statutory rights.
>
> The genesis of the power of the OFCC is the contractual relationship that exists between the Federal Government and those with whom they contract for the acquisition of goods and services. In this jurisdiction the OFCC can and does go beyond those powers granted by the 1964 Civil Rights Act. I think it is important to note that the Chairman of the Equal Employment Opportunity Commission himself

---

[13] We use "72 Leg. Hist. ———" to refer to *Legislative History of the Equal Employment Oppotrunity Act of 1972*, prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (Nov. 1972).

> has testified that you cannot mix these two enforcement authorities. [72 Leg. Hist. at 231].

Supporters of the Committee bill did not dispute the theoretical basis for such a distinction, and they proposed to resolve the dilemma not by leaving administration of the Executive Order with the OFCC, but by making Title VII's ban on quotas equally applicable to the Executive Order: Their solution was that coincident with transfer to the EEOC of authority to enforce the Executive Order, the EEOC should be "prohibited from imposing or requiring a quot[a] or preferential treatment." 72 Leg. Hist. at 189. Rep. Dent, the floor manager of the Committee bill, explained the reason for incorporating this express prohibition.

> My . . . amendment would forbid the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the Federal contract-compliance program. This responsibility, which is now vested in the Office of Federal Contract Compliance of the Department of Labor, would be transferred by H.R. 1746 to the Commission. *Such a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under title VII. My amendment would, for the first time, apply these restrictions to the Federal contract-compliance program.* [72 Leg. Hist. at 190; emphasis added. See also *id.* at 199 (Rep. Perkins); 204, 208 (Rep. Hawkins)].

While there was some debate over the propriety of exacting quotas under the Executive Order as the price for receipt of government contracts (see, *e.g.*, *id.*, at 202, 208-209, 222-223, 231), there was unanimity that quotas were not to be imposed upon employers generally as a matter of statutory law. Rep. Hawkins, the author of the Committee bill, declared:

> [S]*ome say that this bill seeks to establish quotas . . . Not only does Title VII prohibit this,* but it establishes beyond any doubt a prohibition against any individual white as well as black being discriminated

> against in employment. It only seeks to insure that persons will be treated on their individual merits and in accordance with their qualifications. [72 Leg. Hist. at 204; emphasis added].[14]

And Rep. Erlenborn, the author of the rival bill, correctly identified the narrow scope of the dialogue by pointing out that *neither the Committee bill nor the Erlenborn substitute "is going to repeal the prohibition against quotas that is in Title VII of the Civil Rights Act"* [*Id.* at 261].[15]

---

[14] Rep. Hawkins later repeated, during a colloquy, that Title VII already "prohibits the establishment of quotas." *Id.* at 209.

[15] In the end, the House voted to adopt the Erlenborn substitute (*id.* at 312-314). As that substitute contained no provision respecting the administration of Executive Order 11246, the House never voted on the propriety of quotas under the Executive Order.

The fact that the House debate manifests the uniform understanding that Title VII did not permit court-ordered quotas—not a surprising fact in view of the definitive resolution of that controversial issue just eight years earlier—precludes any notion that, because a handful of lower court cases purportedly authorizing court-ordered quotas had been decided by 1972, Congress should be deemed to have acted on the assumption that Title VII authorized such quotas.

Indeed, our research has uncovered only two cases decided prior to the completion of the 1972 consideration of Title VII that even arguably approved quota remedies, and in both the approval was cryptic. In *Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969), the court upheld an injunction striking down nepotism and prior experience as requirements for union membership and "ordered the development of objective mebership criteria," 407 F.2d at 1051, not racial quotas or preferences, to govern future admissions to union membership. Pending development of such objective criteria, the injunction prohibited new admissions of members (save identified discriminatees) and directed that during the interim period work referrals of existing members be made on a chronological basis, with alternating referrals of whites and blacks, *id.* In a cryptic passage near the end of its opinion, the Fifth Circuit explained that the temporary alternating referrals were required for "administrative reasons." *Id.* at 1055. In *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 553-554 (9th Cir.) *cert. denied*, 404 U.S. 984 (1971), the Court, relying on *Vogler*, sustained an injunc-

While the Senate's consideration of proposed amendments was hardly more indicative of a desire to overturn the 1964 decision to prohibit quota remedies, we relegate discussion of the Senate's consideration to the margin. For given the House's unalterable opposition to statutorily-imposed quotas, nothing the Senate might have done *alone* could have effectuated a turnaround of that decision. As this Court has so recently confirmed, a congressional decision made by both houses and signed by the President may not later be overturned even by the positive action of one house, *Immigration and Naturalization Service* v. *Chadha*, —— U.S. ——, 51 L.W. 4907, 4916-18 (June 28, 1983), and *a fortiori* cannot be found inferentially to have been overturned by rejection of proposed amendments within one house.[16]

---

tion that contained compulsory numerical guidelines for minority admissions into apprentice programs, rejecting arguments that the injunction violated § 703(j). The court declared that the injunction it was affirming "did not establish a system of racial quotas or 'preferences' in violation of section 703(j)." 443 F.2d at 554. Thus while close reading of *Vogler* and *Ironworkers* reveals that orders establishing racial preferences were approved, neither case purported to endorse court-ordered racial quotas in Title VII cases. And there was as of 1972 case law and commentary supporting the opposite proposition, *viz.*, that quota remedies are not appropriate under Title VII. *Castro* v. *Beecher*, 334 F. Supp. 930, 945 (D.Mass. 1971); *Developments in the Law—Title VII*, 84 Harv. L. Rev. 1109, 1114-16 (1971).

To say the least, there was not on this issue in 1972 "established judicial precedent" "consistently and routinely" applied as there was in *Herman & MacLean* v. *Huddeston*, —— U.S. ——, 51 LW 4099, 4102 (Jan. 24, 1983); see also, *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 379 (1982) ("the federal courts routinely and consistently had recognized an implied cause of action").

[16] In the Senate, there was one proposed amendment that related tangentially to the issue of court-ordered quotas. Senator Ervin, in the course of introducing numerous amendments to prolong a filibuster, introduced one prohibiting any "department, agency, or officer of the United States" from requiring employers to "practic[e] discrimination in reverse by employing persons" in percentages or

5. That the order entered below would conflict with a bona fide seniority system is another consideration counseling against its propriety. As we show below, that conflict renders the remedy unavailable under Title VII.[17] And while that is not dispositive of the remedy's availability under §§ 1981, 1983 and the Fourteenth Amend-

---

quotas on the basis of race, sex, religion or national origin (72 Leg. Hist. at 1017). This amendment, he explained, was addressed primarily to the OFCC's implementation of Executive Order 11246 to require government contractors to adopt quotas ("the Philadelphia Plan"), and secondarily to "[t]he EEOC", which "on less frequent occasions, has hailed employers before its bar to practice discrimination in reverse." (*Id.* at 1042-45.) The amendment was defeated by a vote of 44-22 (*Id.* at 1074-75).

Given the legislative dynamic in which the Ervin amendment was proposed—an ongoing filibuster that Senator Ervin was seeking to prolong through the introduction of multiple amendments—it is entirely possible that those seeking to end the filibuster (and who voted against *all* the amendments proposed by Senator Ervin) were deciding their vote not on the substance of each amendment, but on the tactical judgment that the way to end the filibuster was to vote down each amendment proffered by those conducting the filibuster. The importance of such tactical considerations in the legislative process make it *always* dangerous to impute a new meaning to a previously enacted statute from the choice of a later Congress *not* to amend that legislation.

Moreover, those not wishing to forbid goals and timetables under the Executive Order were required to vote against the Ervin Amendment, and the vote therefore cannot be understood as manifesting a decision to overturn Congress' 1964 decision disapproving statutorily-imposed quotas.

[17] While it is an open question whether the seniority system here is embodied in a legally enforceable collective agreement (the court below merely assuming *arguendo* that it is, see n.1, *supra*), we do not understand the system's protection under § 703(h) of Title VII to depend upon the resolution of that question. There is no dispute that the employer here wished to implement the seniority system unilaterally, and that the employees had justifiable expectations that layoff decisions would be determined by seniority. We are aware of no authority construing § 703(h) to afford less protection to seniority systems established unilaterally by employers or in non-binding understandings between unions and employers than to those embodied in legally enforceable agreements.

ment, the discussion *supra* at pp. 15-16 demonstrates the pertinence of the congressional decision under Title VII to the appropriateness of the remedy under those provisions.

Section 703(h) is a reflection of Congress' specific desire to protect bona fide seniority systems. And while in terms § 703(h) merely declares that bona fide seniority systems are not to be held violative of Title VII, that provision reflects a congressional concern—that the seniority expectations of innocent employees not be overturned [18]—that must also be respected at the remedial stage of a lawsuit. On this point this case is analytically indistinguishable from *Porter Co.* v. *NLRB*, 397 U.S. 99. The Court dealt there with the relationship between § 8(d) of the NLRA, which states that an employer does not violate his duty to bargain by refusing to agree to a union proposal, and § 10(c), which empowers the NLRB to provide such affirmative remedies against violators "as will effectuate the purposes of the Act." The court of appeals, noting that § 8(d) is a prohibitory and not a remedial provision, held that it did not preclude the Board from directing an employer to agree to a union proposal as a remedy for violations independently found. This Court rejected that reasoning:

---

[18] Opponents of Title VII, during the debates, had pointed to the bill's silence respecting seniority systems as leaving at least ambiguous "Title VII's *impact* on existing collectively bargained seniority rights" (*Teamsters*, 431 U.S. at 352 (emphasis added)), and had predicted that the bill would "destroy" such rights, *id.* at 350. That warning had led to an outpouring of responses from the bill's sposnors, quoted in *American Tobacco Co.* v. *Patterson*, 456 U.S. 53, 72-73, that "the bill would not affect seniority at all;" Title VII "would have no effect on seniority rights existing at the time it takes effect;" Title VII would "have no effect on established seniority rights;" seniority rights "are in no way affected by the bill." The sponsors' intent was that the bill would "protect . . . seniority systems." (*Id.* at 74.) Section 703(h) was added to confirm that intention, and the sponsors' statements following its addition to the bill "are to the effect that 'the Senate substitute bill expressly protects valid seniority systems.'" (*Id.*)

> We may agree with the Court of Appeals that as a matter of strict, literal interpretation [§ 8(d)] refers only to deciding when a violation has occurred, but we do not agree that the observation justifies the conclusion that the remedial powers of the Board are not also limited by the same considerations that led Congress to enact § 8(d). It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. It would be anomalous indeed to hold that while § 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel agreement in that same dispute. [397 U.S. at 107-108 (emphasis in original).]

Section 706(g) of Title VII, like its model § 10(c) of the NLRA (see p. 18 *supra*), authorizes "appropriate" remedies, and "the scope of a district court's remedial powers under Title VII is determined by the purposes of the Act." *Teamsters* v. *United States*, 431 U.S. 324, 364 (1977).[19] Thus, while § 703(h) of Title VII, like § 8(d) of the NLRA, speaks to whether a violation has occurred, both provisions express a congressional policy that precludes the fashioning of remedies inconsistent with that policy.[20]

---

[19] See also, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 770-771 (1977).

[20] This Court's treatment of the interrelationship between § 703(h) and § 706(g) in *Franks*, *supra*, does not undercut the proposition just stated. In *Franks*, the plaintiffs were identifiable victims of post-Act hiring discrimination who sought merely their "rightful place": the place *in the seniority system* that the plaintiffs would have occupied but for the employer's discriminatory refusal to hire them. The Court held that the congressional desire to protect seniority systems did not preclude that particular relief, explaining:

> Petitioners do not ask for modification or elimination of the existing seniority system, but only for an award of the sen-

6. To the foregoing considerations, another must be added. Because we are here dealing with the propriety of courts imposing racial quota remedies, the issue has a constitutional dimension. *Shelley* v. *Kraemer*, 334 U.S. 1, 14-18. All of the opinions in *University of California Regents* v. *Bakke*, 438 U.S. 265, and *Fullilove* v. *Klutznick*, 448 U.S. 448, recognize significant limits on the power of government to engage in race-conscious action. We do not here rehearse the various positions stated in those opinions, or the particular implications of those positions for resolution of the constitutional question that would be presented here were the order entered below held equitable. We note only that, as we have shown, the racial quotas here are not necessary to, or even designed to, remedy the assumed violation in this case. Nor were the courts below carrying out any congressionally determined or mandated policy—quite the contrary as we have shown, *supra*, at pp. 17-28. And, the courts below made no findings to support a conclusion that the drastic con-

---

iority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire. *It is this context that must shape our determination as to the meaning and effect of § 703(h).* [424 U.S. at 758, emphasis added.]

In contrast to the relief sought in *Franks*, the relief ordered in the instant case does constitute a "modification . . . of the existing seniority system." The challenged order here provides that persons who were *not* "victims of illegal discrimination"—and who therefore already are in their rightful place in the seniority system—are able to retain employment in preference to persons who have committed no wrong and who have superior seniority claims to that employment. In *American Tobacco*, *supra*, this Court indicated that rightful place relief for victims is likely the limit of the inroad upon protection of seniority rights permitted at the remedy stage of a Title VII action.

Title VII does affect seniority rights, for *Franks* v. *Bowman Transportation Co.*, *supra*, allows awards of retroactive seniority *to victims of unlawful discrimination*. However, Senator Clark . . . and other key proponents of the bill *intended that it have minimal impact on seniority systems*. [456 U.S. at 74, n.15, emphasis added].

sequences visited by the order here are necessary to achieve any important, much less compelling, governmental interest.

In these circumstances, we suggest that the appropriate disposition should be to foreswear the quota remedy imposed below as lacking equity without squarely addressing or deciding the constitutionality of its issuance. When asked to invalidate Acts of Congress, the Court has long followed "the 'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided'." *United States* v. *Security Industrial Bank*, —— U.S. ——, 51 L.W. 4007, 4009 (Nov. 30, 1982), quoting *Crowell* v. *Benson*, 285 U.S. 22, 62. That course is likewise appropriate in formulating equitable remedies, especially where, as here, complete make-whole relief can be provided without implicating constitutional concerns, and those concerns arise only from an attempted extension of judicial power to achieve results unconnected to the making whole of victims of alleged discrimination.

CONCLUSION

For the above-stated reasons, the judgment below should be reversed.

Respectfully submitted,

J. ALBERT WOLL
815 15th Street
Washington, D.C. 20005

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

APPENDIX

APPENDIX

Statements of Proponents of the Bill That Became the Civil Rights Act of 1964 Respecting the Availability of Quota Remedies under Title VII

I

In the House, the opening speech in support of the bill's passage was delivered by Representative Celler, the Chairman of the House Judiciary Committee. In pertinent part, he stated:

> In the event that wholly voluntary settlement proves to be impossible, the Commission could seek redress in the federal courts, but it would be required to prove in the court that the particular employer involved had in fact, discriminated against one or more of his employees because of race, religion or national origin. . . .
>
> *Even then, the court could not order that any preference be given to any particular race, religion or other group but would be limited to ordering an end to discrimination.*[3]

Subsequent to the House's passage of the bill, the Republican sponsors in the House published a memorandum describing the bill as passed. In pertinent part, the memorandum stated:

> Upon conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. But, *Title VII does not permit the ordering of racial quotas* in businesses or unions

---

[3] 110 Cong. Rec. 1518 (emphasis added). See also *id.* at 1600 (Rep. Minish) ("no quota system will be set up").

and does not permit interferences with seniority rights of employees or union members. [*Id.* at 6566; emphasis added].

When the bill was taken up by the Senate, Senators Humphrey and Kuchel, the co-managers of the bill, undertook a description of each of the Titles. In the course of his description of Title VII, Senator Humphrey detailed the manner in which discrimination claims could be processed through suit and finding of discrimination, and then described the remedial powers available to a court:

> The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the Court could order appropriate affirmative relief, such as hiring or reinstatement of employees and payment of backpay. This relief is similar to that available under the National Labor Relations Act in connection with the unfair labor practices, 29 United States Code 160(b). *No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707(e)* [enacted, without change, as § 706(g)].
>
> * * *
>
> *Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or or to achieve a certain racial balance.*
>
> That bugaboo has been brought up a dozen times; but is nonexistent. [*Id.* at 6548 (emphasis added)]

Senator Kuchel made the other major opening speech in support of the bill. He, too, addressed the "scare charges" that the bill would permit court-ordered quotas:

> Title VII might justly be described as a modest step forward. Yet it is pictured by its opponents and detractors as an intrusion of numerous Federal inspectors as an intrusion of numerout Federal inspectors into our economic life. These inspectors would presumably dictate to labor unions and their members with regard to job seniority, seniority in apprenticeship programs, racial balance in job classifications, racial balance in membership, and preferential advancement for members of so-called minority groups. Nothing could be further from the truth. I have noted that the Equal Employment Opportunity Commission is empowered merely to investigate specific charges of discrimination and attempt to mediate or conciliate the dispute. It would have no opportunity to issue orders to anyone. Only a Federal court could do that, and only after it had been established in that court that discrimination because of race, religion, or national origin had in fact occurred. Any order issued by the Federal district court would, of course, be subject to appeal. *But the important point, in response to the scare charges which have been widely circulated to local unions throughout America, is that the Court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring.* [*Id.* at 6563 (emphasis added)].

Each day during the Senate debates on the Civil Rights bill, the principal Senate sponsors prepared a

Bipartisan Civil Rights Newsletter which was hand-delivered to the office of each Senator supporting the bill. Its purpose, as explained by Senator Humphrey, was "to keep Senators who are in favor of civil rights legislation informed of our point of view."[4] The April 11, 1964, issue of the Newsletter, published two days after the filibuster had begun, declared:

> Under title VII, *not even a Court*, much less the Commission, *could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title.* [*Id.* at 14465; emphasis added].

On May 25, Senator Humphrey introduced a brief explanation of the House bill which he said had been "read and approved by the bipartisan floor managers of the bill in both houses of Congress." *Id.* at 11847. In pertinent part, the explanation provided:

> The relief available is a court order enjoining the offender from engaging further in discriminatory practices and directing the offender to take appropriate affirmative action; for example, reinstating or hiring employees, with or without back pay, . . .
>
> *The Title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment.* [*Ibid.*]

---

[4] *Id.* at 5042. It is apparent from the numerous references to the Newsletter that the publication was widely read by Senators. See *id.* 5044, 5046, 5079, 7474, 8369, 8912, 9105, 9870, 10622, 12210, 14464.

II

The Republican sponsors of Title VII in the House, in their "Additional Views" to the House Judiciary Report, declared:

> It must also be stressed that the [Equal Employment Opportunity] Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions.[1]

Senator Clark, one of the bipartisan "captains" for Title VII, declared in his principal speech describing Title VII: "The suggestion that racial balance or quota systems would be imposed by this proposed legislation is entirely inaccurate."[2] At the conclusion of his speech he introduced a Justice Department letter that stated:

> There is no provision, either in title VII or in any other part of the bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance . . .[3]

And Senator Clark introduced written answers he had prepared to certain "objections" to Title VII that had been voiced, which included the following:

> Objection: The bill would require employers to establish quotas for nonwhites in proportion

---

[1] H. Rep. No. 914, *supra*, at 150.

[2] 110 Cong. Rec. 7207.

[3] *Id.* at 7207.

to the percentage of nonwhites in the labor market area.

Answer: Quotas are themselves discriminatory.[4]

Senator Humphrey, in an extended colloquy with Senator Robertson, made the following remarks:

> I feel sure that the Senator from Virginia is not going to suggest or intimate that under this title of the bill there would be such a thing as a quota or a required percentage.
>
> * * *
>
> [C]an the Senator from Virginia point out in title VII any section or subsection or provision that would indicate that in connection with the elimination of the segregation in employment based on color, race, religion or national origin an employer would be required to hire any member of a certain ethnic group?
>
> * * *
>
> I would like to make an offer to [the Senator]. If the Senator can find in title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating the pages one after another, because it is not in there.[5]

Senator Allot, one of the Republican sponsors of the bill, in another colloquy with Senator Smathers, expressed his disapproval of governmentally-imposed quotas:

> I completely agree with the Senator that if an employer were required to employ a person on

---

[4] *Id.* at 7218.

[5] *Id.* at 7418-20.

> the basis of a quota, there would be no justification for that procedure under the American system . . .
>
> * * *
>
> The only point I wish to make is that if anyone sees in the bill quotas or percentages, he must read that language into it. It is not in the bill.[6]

Senator Keating, in a colloquy with Senator Sparkman, secured the latter's agreement that "the bill does not provide in any way for quotas of any kind."[7] Senator Keating later declared, in response to a public advertisement that the bill would require quotas:

> The coordinating committee has charged . . . that Title VII would . . . permit the Government to impose quotas and preferences upon employers and labor organizations in favor of minority groups . . .
>
> Title VII does not grant this authority to the Federal Government . . .
>
> An employer or labor organization must first be found to have practiced discrimination before a court can issue an order to prohibit further acts of discrimination in the first instance. Adequate administrative and judicial procedures have been provided in the title to assure that an order of court is only founded upon clear and conclusive evidence of discrimination. For the Commission to request or a court to order preferential treatment to a particular minority

---

[6] *Id.* at 8500-01.

[7] *Id.* at 8618.

group would clearly be inconsistent with the guarantees of the Constitution.[8]

[8] *Id.* at 9113. In addition several Congressmen and Senators, recognizing that quotas would inevitably collide with the seniority rights of incumbent employees, cited protection of seniority systems as a reason for their opposition to quotas. See, e.g., the "Additional Remarks" of the Republican sponsors in the House, *supra* at 150; 110 Cong. Rec. 5423 (Sen. Humphrey); *id.* at 6563 (Sen. Kuchel); *id.* at 9113 (Sen. Keating); *id.* at 10520 (Sen. Carlson); *id.* at 11471 (Sen. Javits); *id.* at 15893 (Rep. McCulloch).